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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAELYNE NICKERSON, Defendant and Appellant.	G047334 (Super. Ct. No. 09CF2649) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlson and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Jaelyne Nickerson (Defendant) appeals from an order revoking her probation and ordering her to serve the 10 year sentence previously imposed, but suspended, by the court. She argues the court violated her right to due process by ordering her probation revoked without engaging in an impartial evaluation of whether her violation of the terms of her probation was significant enough to "merit[] imposition of the ten-year prison term . . . ." (Capitalization omitted.) She also argues the court erred by ordering her to pay the full amount of restitution sought by one of her victims, Cal State Fullerton, because a portion of that sum was not supported by substantial evidence.

We affirm the order revoking probation. The evidence that Defendant violated the terms and conditions of her probation was undisputed, and reflected she was continuing to engage in the same fraudulent conduct which gave rise to her earlier crimes. Her own counsel acknowledged that her misconduct was so flagrant "it looks more like a contempt of court" than an ordinary probation violation, and that she had no defense which might justify her actions. Under those circumstances, the court had no choice but to order Defendant's probation revoked; it would have been an abuse of discretion not to. And once the court revoked probation, it had no discretion to do anything other than execute the 10 year sentence it had previously imposed, but ordered stayed.

Finally, we need not reach the merits of the restitution order Defendant challenges. The order was entered in 2010 and was separately appealable. Thus, her attempt to challenge it now is both untimely and outside the scope of this appeal.

FACTS

Defendant was originally charged by felony complaint with one count of seeking aid by misrepresentation (Welf. & Inst. Code, § 10980, subd. (c)(2)) and four counts of committing perjury by false application for aid (Pen. Code, § 118, subd. (a); all further statutory references are to this code.) That complaint, filed in October 2009, identified her as Jaelyne Jacsen, "aka Joyalynn Davis[,] Joya Daaliymple [and] Joyalynn Darlrymple." By March 2010, the third amendment to the complaint added the "Jaelynne Nickerson" to the list of names, deleted one count of committing perjury by false application for aid, and added one count of grand theft (§ 487, subd. (a)), one count of child endangerment (§ 273a, subd.(a)), three counts of financial fraud (§ 532, subd. (a)), and two counts of second degree burglary (§§ 459-460, subd. (b)).

In June of 2010, Defendant pleaded guilty to all 11 felony counts, which carried a maximum prison term of 13 years and 8 months. Before accepting her plea, the court explained to her that although the prosecutor considered her a "serial committer of various kinds of fraud," and was advocating for an immediate prison term of at least 4 to 5 years, it was willing to give her a chance to prove the prosecutor wrong. Rather than sending her to prison immediately, the court was offering her a "negotiated disposition" under which she would be sentenced to prison for a term of 10 years, but with execution of that sentence suspended. The court would then place Defendant on probation for five years, with the requirement she serve a year in county jail. Among the conditions of her five year probation, Defendant would be required to "[a]lways use only your true name," apparently determined to be "Jaelyne Nickerson," and to refrain from "possess[ing] any other person's personal identifying information or personal financial information unless approved in advance by your probation officer."

The court emphasized to Defendant that the probation option being offered to her was a "deal[] with the Devil," because if she was unable to comply with the terms of her probation, and "live crime-free as a law-abiding citizen for five years on probation, this is a huge mistake for you. You ought to just plead guilty, take your lumps, go to prison for a shorter time right now. Because . . . [y]ou're going to prison for a long time if you come back in front of me on a violation." The court then asked Defendant if she had "any doubt in her mind that almost certainly you will go to state prison for 10 years if you violate the terms and conditions of your probation at any time during the next five years?" Defendant answered "No."

With that in mind, the court then accepted Defendant's plea of guilty to all 11 counts, imposed the 10 year sentence and stayed its execution. She agreed to all the terms of her probation, and agreed to pay restitution of $32,851.99 in connection with counts 1, 5, 7, 8, and 11. However, Defendant reserved her right to have a hearing on the restitution claims asserted by the United States Department of Education and by Cal State Fullerton in connection with other counts.

In September 2010, the court held the restitution hearing, and ordered Defendant to pay $21,391 to the United States Department of Education and $22,609.24 to Cal State Fullerton.

In May 2011, the prosecutor filed a petition seeking a warrant for Defendant's arrest, alleging she had violated several terms of her probation, including the requirement she not possess any other person's personal identifying information and the requirement she use only her true name. The petition also alleged Defendant failed to report to her probation officer and her whereabouts were unknown.

The court held a hearing on the petition the next month. During the hearing, the prosecutor introduced evidence that Defendant had not only used false names

in connection with the purchase of automobiles in March, April and May of 2011, but had also done so in connection with applications for food stamps and cash aid and for Medi-Cal benefits in February 2011. She used a social security number that belonged to someone else in connection with the vehicle purchase in March 2011, and she obtained an interim drivers license in the name of Jaelyne Mari Kenadi in February 2011, which she used in connection with the application for food stamps. The evidence also demonstrated that when Defendant's probation officer informed her she would be taken into custody because the prosecutor was pursuing additional criminal charges against her, she fled. Defendant did not dispute this evidence, did not testify, and did not offer any affirmative defense.

Rather than challenging the assertion that she violated the terms and conditions of her probation, Defendant's counsel frankly acknowledged she had done so: "She wasn't complying with the terms and conditions of probation. She was using names other than the ones the court directed her to do. That's very clear from the exhibits []presented to the court." Counsel also admitted that while Defendant had reasons for her actions, those reasons did not amount to a legal defense, which was "one of the reasons I didn't call her to testify to explain it."

Nor did counsel argue that Defendant's probation violations were not significant enough to warrant revocation of her probation. Instead, counsel simply asked the court "to impose a sentence of close to five years," rather than the full 10 years previously imposed and suspended.

The court found Defendant was in violation of the terms and conditions of her probation, and ordered probation revoked. Despite acknowledging its own reluctance to execute the earlier 10 year sentence, the court refused to resentence Defendant to a lesser term. "[W]hen I enter into an agreement [with] a defendant, I regard it as some

sort of contract, especially when I go over the terms and conditions as thoroughly as I did with Miss Nickerson." The court noted the agreement had not been unfair, but was simply "a very stiff sentence that she essentially agreed to if she failed on probation." Ultimately, the court concluded "I cannot find any just reason not to impose it."

DISCUSSION

1. The Order Appealed From

Although Defendant claims she is appealing from a "judgment" which "finally disposes of all issues between the parties," she is incorrect. The judgment in this case was entered back in June 2010, after Defendant pleaded guilty to the 11 felony counts, and the court imposed the 10 year sentence. (§ 1191; *People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

What Defendant actually challenges is the court's order revoking her probation, which was entered in June of 2012. The order is directly appealable as an order entered after judgment. (§ 1237, subd. (b); *People v. Vickers* (1972) 8 Cal.3d 451, 453, fn. 2; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) With that in mind, we turn to Defendant's contentions.

2. The Revocation of Probation

As Defendant points out, "[t]he fundamental role and responsibility of the hearing judge in a revocation proceeding is . . . to determine . . . whether a violation of the terms of probation has occurred, and if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty." (*Lucido v. Superior Court*

(1990) 51 Cal.3d 335, 348.) Defendant contends the court erred because it failed to do either one of those things.

Specifically, Defendant claims the court "failed to make an impartial assessment of [her] probation violations and consider the possibility that a resolution other than imposition of the full [10 year] sentence may be appropriate." (Capitalization omitted.) Defendant goes so far as to claim "it would not have mattered if [her] violation had been minor or technical, nor did it matter what [her] personal circumstances were, because the court had . . . prejudged the outcome should a probation violation be shown." The claim is not a persuasive one.

As we have already noted, both the fact that Defendant violated her probation terms, and the significance of those violations, were undisputed below. And for good reason. Defendant's continued pattern of engaging in fraudulent financial transactions, coupled with her effort to flee after learning she would be taken into custody, gave the court no reasonable option but to revoke her probation. These were not minor or technical violations.

Rather than disputing those issues, Defendant argued instead that upon revocation of her probation, the court should have exercised its discretion to sentence her to a term of less than 10 years, because her probation violation did not warrant such a lengthy term. She repeats that argument on appeal. Unfortunately for Defendant, the court had no such discretion. As explained by our Supreme Court in *People v. Howard*, *supra*, 16 Cal.4th at p. 1084, "if . . . the court actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power . . . to reduce the imposed sentence once it revokes probation." That is what

occurred here. The court actually imposed the 10 year sentence after Defendant pleaded guilty, and suspended only *the execution* of that sentence.

Because the court had no discretion to alter the 10 year sentence it had previously imposed, Defendant's undisputed – and significant – violations of the terms of her probation left it with no alternative but to execute that sentence. There was no error.

3. The Restitution Order

Defendant also challenges the restitution order entered in favor of Cal State Fullerton in 2010, arguing the full amount of the restitution ordered was not supported by substantial evidence. However, that restitution order was directly appealable as an order entered after judgment (*People v. Chappelone* (2010) 183 Cal.App.4th 1159; *People v. Guardado* (1995) 40 Cal.App.4th 757, 763; *People v. DiMora* (1992) 10 Cal.App.4th 1545, 1549-1550), and the time for filing such an appeal has long since passed.

Citing *In re Harris* (1993) 5 Cal.4th 813, 842, Defendant argues the propriety of the restitution order can be raised at any time, because it qualifies as an "unauthorized sentence" which may be corrected "'whenever the error comes to the attention of the court.'" She is incorrect. As explained in *People v. Zito* (1992) 8 Cal.App.4th 736, 742, the primary case Defendant relies upon, an "unauthorized sentence" refers to one where the court *lacked power* to impose it. Thus, a restitution order grounded upon a misapplication of the law can be challenged at any time. By contrast, a defendant's challenge to "the identity and specificity of the losses involved" in a restitution order "is a purely factual issue, [and as such] is susceptible of waiver." (*Ibid.*) That is what occurred here. Defendant's failure to promptly appeal from the restitution order in favor of Cal State Fullerton effected a waiver.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.